3-21-2012

State v. Baker Appellant's Brief Dckt. 39181

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39181
	)	
v.	)	
	)	
CHARLES LEO BAKER,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE BENJAMIN R. SIMPSON
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

BRIAN R. DICKSON
Deputy State Appellate Public Defender
I.S.B. #8701
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

Mr. Baker pled guilty to two felony counts. For one, he did so via an *Alford* plea.[1] These were his first felony convictions, and he had been a relatively stable, law-abiding citizen for most of his adult life. He was amenable to treatment and he accepted responsibility for his actions. However, because he decided to plead to one count via *Alford*, the district court imposed a prison sentence instead of retaining jurisdiction, as the presentence investigator had recommended. In doing so, the district court abused its discretion and imposed excessive sentences. This Court should remedy that abuse.

Statement of the Facts & Course of Proceedings

Pursuant to a non-binding plea agreement, Mr. Baker pled guilty to two counts of criminal conduct (Count I, sexual battery of a minor who is sixteen or seventeen years old and Count II, attempted rape). (R., pp.42-43 and Tr., p.10, L.2 - p.12, L.23.) In exchange, the State agreed to drop Count III. (Tr., p.5, Ls.15-16.) In doing so, Mr. Baker maintained that he was innocent as to Count I, but recognized that the State could present sufficient evidence to gain a conviction, and so pled guilty via an *Alford* plea in regard to Count I. (Tr., p.10, L.2 - p.11, L.21.) Specifically, he contended that he had never touched the victim's breasts during their encounter.[2] (Tr., p.10,

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[1] A plea made pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37 (1970), whereby the defendant is permitted to not admit guilt, but still take advantage of a plea agreement if he believes the state would likely obtain a conviction at trial.

[2] The State charged the offense as "[Mr. Baker] . . . did commit Sexual Battery by having sexual contact with K.S.N. a child of sixteen or seventeen years of age, to-wit: 16 years old by touching her breasts . . . ." (R., p.43.)

L.13 - p.11, L.1.) The district court, despite its distaste for *Alford* pleas in sex cases, accepted both guilty pleas as they were offered. (R., p.63; Tr., p.13, Ls.1-5.)

These were Mr. Baker's first felony charges. (Presentence Investigation Report (*hereinafter,* PSI), pp.4-5.)[3] Otherwise, his criminal record only consisted of three misdemeanors, one probation/parole violation, and six traffic infractions. (PSI, p.5.) He had also been fairly stable, working some thirteen years for the same employer before a lack of business forced the company to lay him off. (PSI, 9.) During his pretrial and presentencing release, Mr. Baker was on time for his appointments and court dates. (Tr., p.26, L.24 - p.27, L.3; PSI, p.49.) He cooperated with the presentence examinations and was truthful on his polygraph. (PSI, pp.32, 37.) He scored a 2 of 12 on his STATIC-99 examination, which placed him in a low-moderate risk to reoffend category. (PSI, p.38.) He accepted responsibility for his actions, even though he was unable to effectively communicate that to the presentence investigator. (Tr., p.19, Ls.12-19 and PSI, p.13.) He was also amenable to treatment.[4] Ultimately, the presentence investigator recommended that the district court retain jurisdiction and

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[3] PSI page numbers correspond with the page numbers of the electronic file "Sealed Charles leo Baker.pdf." Included in this file is the PSI report as well as all the documents attached thereto (*i.e.*, police reports, psychological evaluations).

[4] There is a difference of opinion as to Mr. Baker's amenability to treatment between the doctors who performed his psychological/psychosexual examination and the neuropsychological examination. As part of his psychological/psychosexual examination, Dr. Paul Wert made a general diagnosis of dementia resulting from head trauma Mr. Baker received as an adolescent. (PSI, p.38.) As a result of these observations, Dr. Wert concluded that Mr. Baker would not significantly benefit from rehabilitative treatment. (PSI, p.38.) Subsequently, Mr. Baker consulted Dr. John Wolfe to perform specific tests designed to diagnose dementia and its affect on his amenability to treatment. (*See generally* PSI, pp.49-57.) Dr. Wolfe determined that the diagnosis of dementia was inaccurate and that Mr. Baker's condition was more properly classified as a "cognitive disorder, [not otherwise specified] NOS, secondary to brain injury." (PSI, p.56.) In light of this more accurate diagnosis, Dr. Wolfe concluded that Mr. Baker could receive a benefit from rehabilitative opportunities, provided some accommodations were made for him.

recommend Mr. Baker participate in the Traditional Retained Jurisdiction Program. (PSI, p.13.)

The district court, however, decided to impose a prison sentence. (R., pp.89-91.) Its reason for imposing a prison sentence was, in its own words, "I am doing that in consideration of the fact that you entered an *Alford* plea . . . ." (Tr., p.32, Ls.7-8.) To that end, it imposed two concurrent unified sentences of ten years, with two years fixed. (R., pp.89-91.)

Mr. Baker timely appealed from that judgment. (R., p.92.)

ISSUES

1. Whether the district court imposed a vindictive sentence after Mr. Baker exercised his right to enter an *Alford* plea.

2. Whether the district court abused its discretion when it imposed concurrent unified sentences of ten years, with two years fixed, upon Mr. Baker following his plea of guilty to sexual battery of a minor, who is sixteen or seventeen years old, and attempted rape.

ARGUMENT

I.

The District Court Imposed A Vindictive Sentence After Mr. Baker Exercised His Right To Enter An *Alford* Plea

A. Introduction

The district court imposed a vindictive sentence in this case, based on the fact that Mr. Baker had entered an *Alford* plea. And while Mr. Baker did not object at trial, this Court is able to review the issue as fundamental error, pursuant to *State v. Perry*, 150 Idaho 209, 226 (2010), *reh'g denied*. To show fundamental error, the defendant must demonstrate that the alleged error: "(1) violates one or more of the defendant's unwaived constitutional rights; (2) the error is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) the error affected the outcome of the trial proceedings." *Perry*, 150 Idaho at 228; *State v. Corbus*, 151 Idaho 368, 371 (Ct. App. 2011), *rev. denied*. The record in this case demonstrates that the imposition of sentence was a fundamental error under the *Perry* test.

B. The Sentence Was Imposed In Violation Of Mr. Baker's Unwaived Constitutional Due Process Rights

Even before its decision in *Perry*, the Idaho Supreme Court recognized that "right to be free from vindictive sentencing" constitutes a fundamental error that can be reviewed for the first time on appeal, "because it would go to the foundation or basis of [the defendant's] rights." *State v. Robbins*, 123 Idaho 527, 530 (1993). In particular, the United States Supreme Court has recognized that a vindictive sentence imposed in response to the defendant's exercise of one of his rights (such as the right to have a

trial or to appeal) during the proceedings violates the constitutional protections of due process, as provided by the Fourteenth Amendment. *North Carolina v. Pearce*, 395 U.S. 711, 723-24 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794 (1989); *State v. Regester*, 106 Idaho 296, 298 (Ct. App. 1984). The Idaho Court of Appeals has recently recognized a distinction in this regard – particularly that the presumption of vindictiveness established in *Pearce* only applies when the defendant is alleging he received a vindictive sentence following a successful challenge to his sentence, but not when he challenges his initial sentence as vindictively imposed. *State v. Grist*, ___ Idaho ___, February 24, 2012 Opinion at 5 (Ct. App. 2012), *petition for review filed*, (distinguishing *Pearce*, 395 U.S. 711 and *Regester*, 106 Idaho at 298). In such cases where the presumption does not apply, the defendant must demonstrate the vindictiveness from the record. *Regester*, 106 Idaho at 299; *Robbins*, 123 Idaho at 532. Mr. Baker recognizes that the presumption does not apply in his case since he is challenging the initial sentencing determination, not a subsequent determination following a successful challenge to his sentence. *See Grist*, ___ Idaho ___, February 24, 2012 Opinion at 5. Therefore, to meet this prong of the *Perry* fundamental error test, Mr. Baker must demonstrate that the district court imposed a vindictive sentence based upon the exercise of one of his rights.

The record is clear that the district court's decision to impose sentence, as opposed to retaining jurisdiction (as was recommended by the presentence investigator (PSI, p.13)), was "in consideration of the fact that [Mr. Baker] entered an *Alford* plea . . . ." (Tr., p.32, Ls.7-8.) Mr. Baker had the right to invoke an *Alford* plea because, as the United States Supreme Court has held, declaration of guilt is not a constitutional requirement in regard to guilty pleas. *Alford*, 400 U.S. at 37. Therefore, it permits

defendants to plead guilty without admitting guilt.[5] The purpose of such pleas is to put an end to the matter. *See State v. Jones*, 129 Idaho 471, 474 (Ct. App. 1996). Mr. Baker recognized that, based on the evidence it had, the State was more than likely to meet its burden of proof and ultimately get a conviction. (Tr., p.10, L.18 - p.11, L.19.) Therefore, rather than go through a trial, he decided to enter a knowing, intelligent, and voluntary guilty plea, despite maintaining his innocence, in order to more efficiently resolve the matter. (*See* Tr., pp.10-11.) His decision to pursue this course was within his rights. *See Alford*, 400 U.S. at 37; *Howry*, 127 Idaho at 96.

As a result, the district court's decision to impose a prison sentence "in consideration of the fact that [Mr. Baker] entered an *Alford* plea" (Tr., p.32, Ls.7-8), demonstrates the vindictiveness in sentencing. *Compare Regester*, 106 Idaho at 299. As such, the sentence violated Mr. Baker's unwaived constitutional right to due process. *See Alford*, 400 U.S. at 37. Thus, the first prong of the *Perry* test is met. *See Perry*, 150 Idaho at 228.

C. The Violation Of Mr. Baker's Constitutional Rights Is Clear And Obvious From The Record

As discussed in Section I(B), *supra*, the district court imposed sentence "in consideration of the fact that [Mr. Baker] entered an *Alford* plea . . . ." (Tr., p.32, Ls.7-8.) As such, the district court's violation of those rights is clear from the record. This is because, as the Court of Appeals has recently held, "[w]hile failure to acknowledge guilt

[5] The Supreme Court specifically allowed that courts did not have to accept such guilty pleas. *Alford*, 400 U.S. at 37. In any event, Idaho recognizes the validity of *Alford* pleas. *See, e.g., State v. Howry*, 127 Idaho 94, 96 (Ct. App. 1995). And, although it did not have to, the district court did accept Mr. Baker's *Alford* plea in this case. (R., p.63; Tr., p.13, Ls.1-5.) Thus, Mr. Baker validly exercised this right, permitted by federal and state precedent. *See, e.g., Alford*, U.S. at 37; *Howry*, 127 Idaho at 96.

may indicate a lack of rehabilitative potential, maintaining a position of innocence as Grist has done here . . . is insufficient to justify an increased sentence." *Grist*, ___ Idaho ___, February 24, 2012 Opinion at 9. Because all that Mr. Baker has done by entering an *Alford* plea is maintain a position of innocence,[6] the district court's decision to impose a prison sentence based on that act is a clear and obvious violation of his rights. As such, the second prong of the *Perry* test is met. *See Perry*, 150 Idaho at 228.

D. The District Court's Error Affected The Outcome Of The Case

In this regard, the fact that Mr. Baker received a more excessive sentence because he chose to make an *Alford* plea demonstrates that the violation of his rights affected the outcome of his case. First, the presentence investigator's recommendation was that Mr. Childers participate in a rider program. (PSI, p.13.) Since the district court decided to go beyond that recommendation because Mr. Baker exercised his rights, that demonstrates how the district court's error affected the outcome of his case.

Second, as will be discussed in more depth in Section II, *infra*, had the district court engaged in a proper sentencing determination, a more lenient sentence would

[6] Mr. Baker only entered an *Alford* plea in regard to Count I of the Information (sexual battery of a minor). (Tr., p.10, L.11 - p.11, L.21; R., p.43.) He maintained that he had not, as the Information alleged, touch K.S.N.'s breasts, and thus, not committed sexual battery. (*See* Tr., p.10, L.18 - p.11, L.19; R. p.43.) He did, however, admit guilt in regard to Count II (attempted rape) and did not contest any of the facts relating to that charge. (Tr., p.12, Ls.7-25.) As such, his *Alford* plea was only in relation to Count I. This also reveals that he was not unwilling to admit guilt or accept responsibility, so his exercise of this right has less impact than a complete refusal to admit guilt. *Compare Grist*, ___ Idaho ___, February 24, 2012 Opinion at 9. Thus, as the continued assertion of innocence was insufficient to justify Mr. Grist's more excessive sentence, it certainly cannot justify Mr. Baker's more excessive sentence. *See id.*

have been appropriate.[7] Therefore, the more excessive sentence will cause him to serve more prison time than he would have, had the district court properly considered the mitigating factors. As such, the district court's decision to impose a prison sentence "in consideration of the fact that [Mr. Baker] entered an *Alford* plea" affected the outcome of his case, causing him to serve a prison sentence as opposed to a period of retained jurisdiction. Thus, the third prong of the *Perry* test is met. *See Perry*, 150 Idaho at 228.

Because the district court committed a fundamental error and vindictively sentenced Mr. Baker for his decision to enter an *Alford* plea, this Court should vacate his sentence and remand for new sentencing.

II.

The District Court Abused Its Discretion When It Imposed Concurrent Unified Sentences Of Ten Years, With Two Years Fixed, Upon Mr. Baker Following His Plea Of Guilty To Sexual Battery Of A Minor Who Is Sixteen Or Seventeen Years Old, And Attempted Rape

A. Introduction

Should this Court find that the sentence was not vindictive, it should still reduce it or remand for a new sentencing hearing because the district court insufficiently considered various mitigating factors which justify a more lenient sentence. Mr. Baker was a relatively stable, law-abiding citizen for most of his adult life, only accumulating a few misdemeanors and traffic infractions. He worked for one employer for thirteen years until the lack of business led to the termination of his position. Yet, when he was sentenced for these crimes, the district court did not sufficiently consider that evidence

[7] For example, one of the mitigating factors was that these were Mr. Baker's first felony offenses, and he has a minimal criminal record otherwise. (PSI, pp.4-5.)

or the fact that he had accepted responsibility for his actions and was amenable to treatment. In doing so, it insufficiently considered Idaho's recognized sentencing objectives. As a result, it imposed excessive sentences in an abuse of its discretion. This Court should remedy these abuses.

B. In Light Of A Sufficient Consideration Of The Sentencing Objectives And Mitigating Factors, The Imposed Sentences Are Excessive And Constitute An Abuse Of Discretion

Mr. Baker asserts that, given any view of the facts, his unified sentences of ten years, with two years fixed, are excessive. Where a defendant contends that the sentencing court imposed excessively harsh sentences the appellate court will conduct an independent review of the record, giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771, 772 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Baker does not allege that his sentences exceed the statutory maximum. Accordingly, in order to show an abuse of discretion, he must show that, in light of the governing criteria, the sentences were excessive considering any view of the facts. *Id.* The governing criteria, or sentencing objectives, are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* The protection of society is the primary objective the court should consider. *State v. Charboneau*, 124 Idaho 497, 500 (1993). Therefore, sentences

that protect society and also accomplishes the other objectives will be considered reasonable. *Id.*; *State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982). This is because the protection of society is influenced by each of the other objectives, and as a result, each must be addressed in sentencing. *Charboneau*, 124 Idaho at 500.

There are several factors that the appellate court should consider to determine whether the objectives are served by a particular sentence. *State v. Knighton*, 143 Idaho 318, 320 (2006). They include, but are not limited to: "the defendant's good character, status as a first-time offender, sincere expressions of remorse and amenability to treatment, and support of family." *Id.* Insufficient consideration of these factors has been the basis for a more lenient sentence in several cases. *See, e.g., Cook v. State*, 145 Idaho 482, 489-90 (Ct. App. 2008); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991); *State v. Carrasco*, 114 Idaho 348, 354-55 (Ct. App. 1988), *rev'd on other grounds*, 117 Idaho 295, 301 (1990); *State v. Shideler*, 103 Idaho 593, 595 (1982). In this case, several of those factors are present, but were insufficiently considered by the district court as it crafted Mr. Baker's sentences, and, as a result, the sentences do not serve the objectives, and are excessive.

First, Mr. Baker demonstrated his amenability for treatment. Although he was unable to effectively communicate the fact to the presentence investigator, he does not blame the victim; rather, he accepted responsibility for his actions.[8] (Tr., p.19, Ls.12-19.) By acknowledging his guilt and accepting responsibility, he has taken the critical first steps toward rehabilitation. *See State v. Kellis*, 148 Idaho 812, 815 (Ct. App. 2010), *rev. denied.*

[8] Although he only admitted guilt to one of these offenses, he accepted responsibility for both. (*See* Tr., p.19, Ls.12-19; PSI, p.13.)

Additionally, he has demonstrated several redeeming character traits during these proceedings. For example, although he was not incarcerated during these proceedings, he appeared for all his appointments and court proceedings. (Tr., p.26, L.24 - p.27, L.3; PSI, p.49.) He was also cooperative during the required evaluations. (*See* PSI, p.32.) He was truthful on his polygraph examination, which determined this was his only victim. (PSI, p.37.) Cooperation with authorities is a fact the courts should consider in mitigation. *See State v. Ybarra*, 122 Idaho 11, 16 (Ct. App. 1992) (considering the fact that the defendant was unwilling to cooperate until after he was sentenced as a character trait which indicated no relief was justified).

Furthermore, he was amenable to treatment. The advice from Dr. Wert – that Mr. Baker suffered from dementia, and so treatment would be largely ineffective – was inaccurate. The tests performed by Dr. Wolfe (specifically aimed at diagnosing dementia) revealed that the more correct diagnosis was a cognitive disorder, NOS, secondary to his brain injury. (PSI, p.56.) The Idaho Supreme Court has recognized that Idaho Code § 19-2523 not only suggests, but requires, the trial court to consider a defendant's mental condition as a sentencing factor. *Hollon v. State*, 132 Idaho 573, 581 (1999). In that regard, the more appropriate diagnosis, based on the more targeted tests, revealed that Mr. Baker could effectively participate in rehabilitative programs, so long as some accommodations were provided, as particular rehabilitative techniques would be more effective for him. (PSI, pp.56-57.) Dr. Wolfe recognized that with the aid some of these techniques, Mr. Baker would struggle, but that did not preclude the potential for all treatment. (PSI, p.57.) Therefore, while Dr. Wert's perspective was not wholly incorrect, it was not the most accurate representation of Mr. Baker's rehabilitative potential. A sufficient consideration of Mr. Baker's mental condition reveals that he is

capable of rehabilitating. Therefore, a sufficient consideration of Mr. Baker's character reveals that he is not only amenable to such treatment, but cooperative in similar situations. Both of these factors indicate a more lenient sentence would be appropriate. *Compare, e.g., Shideler*, 103 Idaho at 595.

The Court of Appeals has also specifically recognized that, "[f]or someone with a relatively stable background who had apparently spent the majority of his adult years as a law-abiding citizen, it is certainly reasonable to believe that a lesser term of incarceration . . . would be sufficient to [address all four sentencing objectives]." *Cook*, 145 Idaho at 489. Similarly, Mr. Baker had a relatively stable background. He worked for the same employer for some thirteen years before the company was forced to lay him off due to lack of business. (PSI, pp.9-10.) Had the company been able to support his position, it is likely that he would still be working there. (PSI, p.56.) He also has spent the majority of his adult years as a law-abiding citizen.[9] These are his first felony offenses. (PSI, pp.4-5.) Otherwise, he only has a few misdemeanor offenses, a parole/probation violation, and some traffic infractions on his record. (PSI, pp.4-5.)

The fact that these are his first felony offenses also deserves particular consideration. The Idaho Supreme Court has "recognized that the first offender should be accorded more lenient treatment than the habitual criminal." *Shideler*, 103 Idaho at 595, (quoting *State v. Owen*, 73 Idaho 394, 402 (1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227, 228 (1971)). This is because such a person does not yet have a fixed character for crime and so rehabilitation at this point is more likely. *Owen*, 73 Idaho at 402. Therefore, since these are Mr. Baker's first felonies and he is not a habitual offender, the time to employ rehabilitative options is now. As a result, a

[9] Mr. Baker was 35 years old at the time of sentencing. (PSI, p.1.)

more lenient sentence, such as a period of retained jurisdiction, which provides such a rehabilitative opportunity, should have been imposed.

The district court's idea of a treatment opportunity, however, was to impose a longer sentence so that Mr. Baker would have plenty of time to participate in rehabilitative programs. (*See* Tr., p.32, Ls.13-19.) This was improper for several reasons. First, the United States Supreme Court has recently found this perspective untenable. *See Tapia v. United States.*, 131 S. Ct. 2382, 2388-89 (2011) (interpreting U.S.C. § 3582(a)). That Court held that, because sentencing courts could only recommend, but not require, participation in prison rehabilitative programs, they were precluded from imposing or lengthening a prison term (as the district court did in this case) for the purpose of promoting the offender's rehabilitation. *Id.* at 2390-91. Idaho courts are similarly limited. *See, e.g., State v. Oliver*, 144 Idaho 722, 726 (2007) (quoting *State v. Huffman*, 144 Idaho 201, 203 (2007), "whether or not a defendant serves longer than the fixed portion of the sentence is a matter left to the sole discretion of the parole board, and '[c]ourts cannot intrude on this discretion when fashioning a sentence nor when reviewing a sentence[.]'").[10] Therefore, the district court's decision to impose a prison sentence simply to provide more time for participation in the prison's rehabilitative programs was in error. *See Tapia*, 131 S. Ct. at 2388-91; *Oliver*, 144 Idaho at 726.

Furthermore, the district court noted that the prison programming might include sex offender treatment, implying that such an opportunity was not assured. (Tr., p.32, Ls.15-17.) It also informed Mr. Baker that he "will become eligible for programming,"

[10] The inference from these holdings is that the courts are powerless to enforce any determinations as to whether a defendant must complete a certain rehabilitative program before he is eligible for release.

which indicates that his rehabilitation will be delayed. (Tr., p.32, L.15.) These considerations by the district court are particularly disconcerting because the Idaho Supreme Court has realized that timing is an important consideration when addressing rehabilitation. *See Owen*, 73 Idaho at 402; *State v. Nice*, 103 Idaho 89, 91 (1982). The Court of Appeals has also continued to recognize that timely and effective rehabilitation justifies lesser prison sentences. *See, e.g., Cook*, 145 Idaho at 489; *State v. Eubank*, 114 Idaho 635, 639 (Ct. App. 1988). Delaying rehabilitation is inappropriate because sentences are to be crafted so that they do not force the prison system to continue detaining a person once rehabilitation or age has decreased the risk of recidivism. *Id.* By delaying (or potentially denying) his rehabilitative opportunities, Mr. Baker's sentence operates contrary to the admonitions from *Cook* and *Eubank*. As such, Mr. Baker's sentence is excessive and was imposed in an abuse of the district court's discretion.

A sufficient examination of all these mitigating factors reveals that a more lenient sentence, one aimed at rehabilitation, also addresses all the other sentencing objectives – protection of society, punishment, and deterrence. *See State v. Ransom*, 124 Idaho 703, 713 (1993) (requiring that alternative sentences still address all the sentencing objectives). As previously noted, "[f]or someone with a relatively stable background who had apparently spent the majority of his adult years as a law-abiding citizen, it is certainly reasonable to believe that a lesser term of incarceration . . . would be sufficient to [address all four sentencing objectives]." *Cook*, 145 Idaho at 489. Additionally, when a sentencing court retains jurisdiction,[11] it still imposes and executes

[11] Both the presentence investigator and defense counsel recommended that the district court retain jurisdiction in this case. (PSI, p.13; Tr., p.29, L.25 - p.30, L.1.)

a sentence. Therefore, both the retributive and the deterrent effects of the imposed sentence are still present. *See State v. Crockett*, 146 Idaho 13, 14-15 (Ct. App. 2008), (discussing how even a sentence for a period of probation addresses all the sentencing objectives and how the role that a court's continuing jurisdiction affects those objectives). Such a sentence punishes Mr. Baker by depriving him not only of his liberty for that period of time, but several of his rights (such as the right to possess a firearm) as well, since these were felony offenses. These results, along with the imposed sentences, also serve as a deterrent against society at large. Furthermore, it deters Mr. Baker specifically because the sentence need not be suspended should he perform poorly or otherwise violate the terms of the rider. Even if he completes the rider and is placed on probation, the looming sentence still deters him from violating his probation.

In this case, the district court does not lose anything in terms of protection of society, deterrence, or punishment by retaining jurisdiction. Society receives equally similar protection during the period of retained jurisdiction as it does by incarcerating him. Mr. Baker is in the custody of the Department of Correction either way. He cannot harm society during that period, so society is protected whether he is on a rider or in prison. Furthermore, Mr. Baker does not present a significant risk to society. On his STATIC-99 test, he scored a 2 of 12, which puts him in the low-moderate range to reoffend. (PSI, p.38.) He also performed well while released in the pretrial stages of these proceedings. (Tr. p.27, Ls.3-8.) Therefore, the fact that he does not present a significant risk to society justifies a more lenient sentence. *See Cook*, 145 Idaho at 489; *Eubank*, 114 Idaho at 639. However, the district court would also retain the ability to leave Mr. Baker incarcerated for the entire fixed term of the sentence if he did not show progress on the rider. And if the district court did that, the Parole Board has broad

discretion over whether to release him on parole during the indeterminate term of his sentence. *See State v. Stover*, 140 Idaho 927, 931 (2005). The only difference between that result and the currently-imposed sentence is that the district court could relinquish jurisdiction knowing that all the sentencing objectives properly addressed.

What the period of retained jurisdiction provides that the prison sentence does not is the opportunity to rehabilitate now, and as the Idaho Supreme Court has noted, rehabilitation is more likely now than in the future. *See, e.g., Owen*, 73 Idaho at 402. Finally, that sentence would follow the presentence investigator's recommendation, which was that Mr. Baker be sent to the Traditional Retained Jurisdiction Program because it would provide him with programs designed to help him address his sexual behavior issues, as well as his general criminal issues, in a controlled environment. (PSI, p.13.) This differs from the prison rehabilitative programs, which only might include specific sexual behavior courses. (*See* Tr., p.32, Ls.15-17.)

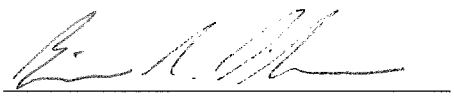
Therefore, because the district court insufficiently considered these mitigating factors, it imposed excessive sentences in an abuse of its discretion. This Court should remedy that abuse.

CONCLUSION

Because the district court imposed a vindictive sentence, Mr. Baker respectfully requests that this Court vacate his sentence and remand for resentencing.

Otherwise, because the district court insufficiently considered the mitigating factors present in his case, Mr. Baker respectfully requests that this Court reduce his sentences as it deems appropriate. Alternatively, he requests that his case be remanded to the district court for a new sentencing hearing.

DATED this 21st day of March, 2012.



BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of March, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

CHARLES LEO BAKER
INMATE #99614
ICC
PO BOX 70010
BOISE ID 83707

BENJAMIN R SIMPSON
DISTRICT COURT JUDGE
E-MAILED BRIEF

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.

EVAN A. SMITH
Administrative Assistant

BRD/eas